

CLASS DEVIATION TO REFLECT CHANGES TO CERTAIN INTELLECTUAL PROPERTY CLAUSES

FINDINGS

1. Rights in data, including copyright, and technology transfer under certain of Department of Energy's (DOE's) management and operating contracts (M&O) are controlled by two clauses from the Department of Energy Acquisition Regulation (DEAR). Those two clauses are Rights in Data-Technology Transfer clause at 970.5227-2 and the Technology Transfer Mission clause at 970.5227-3.

2. Traditionally, software code has been either protected by copyright or placed in the public domain. DOE has several statutes that require this Department to disseminate the scientific and technical information, including software, first produced under its contracts to the public.

3. The intellectual property clauses included in DOE M&O contracts having technology transfer as a part of their mission have dealt with software accordingly, requiring DOE permission to assert the contractor's copyright in software first produced under its contract. In instances in which DOE grants such permission, contractors are authorized to commercialize or license the software to those who would commercialize and thereby promote the dissemination of the software.

4. Open source software (OSS) licensing is a recent development affecting copyrighted software. A user of the software must accept one of various license forms under which the licensee agrees to post any improvements in or any derivative works resulting from the software for use by others in accordance with the license or to make commercial use of derivative works limited only to the licensee's contribution to the software. This method of licensing has proven to be popular with scientists in DOE's research laboratories, allowing a platform for collegial and interactive research. DOE further recognizes that OSS licensing is consistent with this Department's duty to disseminate the results of its research.

5. The Rights in Data-Technology Transfer clause at 970.5227-2, the clause dealing with copyright under the contract, does not provide conditions under which DOE's M&O contractors may elect to subject software first produced under their contracts to an OSS license.

6. Additionally, the Technology Transfer Mission clause at 970.5227-3 requires consideration by the M&O contractor and the DOE contracting Officer of a prospective foreign partner's home country's treatment of U.S. companies' Intellectual Property and whether U.S. companies have opportunities to do collaborative research in the home country. DOE has exercised its discretion to require M&O contractors to obtain the written information from the U.S. Trade Representative (U.S.T.R.) to assist in such consideration. After many years of experience, DOE has determined that a less cumbersome procedure, relying on information available from U.S.T.R. web sites, can be

utilized for obtaining the relevant information. This less cumbersome procedure is reflected in a new subparagraph (f)(1)(ii)(C).

7. The clauses at Rights in Data-Technology Transfer clause at 970.5227-2 and the Technology Transfer Mission clause at 970.5227-3, respectively, have been altered to provide DOE's M&O contractors which have technology transfer as their mission (1) to allow OSS copyright of software first produced under their contracts and (2) to simplify the process of obtaining information about foreign countries from the U.S.T.R.

8. The Government would incur no additional cost as a result of the Contractor implementing and complying with and DOE would benefit from the proposed deviations.

RECOMMENDATION

Based upon these findings, I hereby determine that the proposed class deviations are beneficial to the accomplishment of DOE's mission and its mission of technology transfer. Contracting officers will be authorized to negotiate this clause into existing M&O contracts at the next appropriate opportunity. The described deviations will be effective through the promulgation of the final rule.

APPROVED  DATE 8-1-2006

Edward R. Simpson, Director
Office of Procurement and
Assistance Management

APPROVED  DATE 8/1/2006

David O. Boyd, Acting Director
Office of Acquisition and
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